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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 721 720

THOMAS J. BRENNAN, 44 Beatrice Avenue, Buffalo, New York, as President of Lackawanna Lodge No. 715, Brotherhood of Railroad Trainmen,

A. F. WHITNEY, Cleveland 13, Ohio, as President of the Brotherhood of Railroad Trainmen of the Delaware, Lackawanna & Western Railroad Company,

J. P. CAWLEY, 20 Orchard Street, Scranton, Pennsylvania, Acting General Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen of the Delaware, Lackawanna & Western Railroad Company System,

A. E. CUMBLER, 20 Romelene Street, Buffalo, New York, as President of Local Lodge No. 715 of the Brotherhood of Railroad Trainmen of the Delaware, Lackawanna & Western Railroad Company,

Petitioners,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, 1 Main Street, Buffalo, New York,

GEORGE C. SLADE, 1516 Nielson Avenue, Utica, New York, as General Chairman of the General Adjustment Committee of the Delaware, Lackawanna & Western Railroad Company of the Switchmen's Union of North America,

JOHN J. SHAUGHNESSY, 1108 Oak Street, Elmira, New York, as General Chairman of the Order of Railway Conductors of America for the Delaware, Lackawanna & Western Railroad Company,

ARTHUR J. GLOVER, 3 Linwood Avenue, Buffalo, New York, as President of the Switchmen's Union of North America,

JOHN J. KINMARTIN, 13 Kermit Avenue, Buffalo, New York, as President of Buffalo Lodge No. 4, Switchmen's Union of North America,

THOMAS L. JOYCE, 2907 Birney Avenue, Scranton, Pennsylvania, as General Chairman of the Switchmen's Union of North America, for the Delaware, Lackawanna & Western Railroad Company,

HAROLD V. HEEB, 215 Greene Street, Buffalo, New York, as Local Chairman of Switchmen's Union of North America for the Delaware, Lackawanna & Western Railroad Company for the Buffalo District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

THOMAS J. McKENNA,
705 Morgan Building,
Buffalo 2, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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OCTOBER TERM, 1952.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of Supreme Court of the United States:

The petition of THOMAS J. BRENNAN, as President of Lackawanna Lodge No. 715, Brotherhood of Railroad Trainmen, *et al.*, respectfully shows:

I.

The Matter Involved.

The Brotherhood of Railroad Trainmen, a railroad labor organization, national in scope, and its local, through their officials as petitioners, challenge the action of the Court of Appeals of the State of New York in affirming another appellate court's dismissal of their complaint for a declaratory judgment (§ 473 C. P. A.) on the authority of Slocum v. Delaware, Lackawanna & Western Railroad (339 U. S. 239). The dispute involved was created in December, 1937, when respondent, Delaware, Lackawanna & Western Railroad (hereafter referred to as "defendant railroad" or "defendant carrier") within its Buffalo District, refused to employ members of petitioners' union on the "3 P. M. City Line Job" after changing it from one of switching to one classified as road service (R. 374; Pltfs. Ex. 7, R. 258, 429, 430; Pltfs. Ex. 19 in Ev., R. 529; Defts. Ex. G, R. 441). Petitioners' claim to this job was based on defendant carrier's May 26th, 1920 joint contract with the Order of Railway Conductors (hereafter referred to as "conductors") and petitioner, Brotherhood of Railroad Trainmen (hereafter noted as "trainmen" or "plaintiff union") (Find. 3, Pltfs. Ex. 5, R. 251).

Before seeking relief from the courts, plaintiffs' union, in conformity with the purpose of the Railway Labor Act, exhausted the possibility of obtaining such relief under the administrative procedure of that Act (48 Stat. 1185; 45 U. S. C. A. 151, *et seq.)* (Pltfs. Ex. 5, R. 251; Pltfs. Ex. 2a, 2b, R. 245, 253).

Petitioners contend that the Court of Appeals has erroneously construed the applicable statutes of the Railway Labor Act, and has also erroneously construed this Court's (U. S. Supreme Court) judicial interpretation of said

statutes, so as to destroy the scheme and design of the Act. By so doing, petitioners further contend, that that Court violated their rights under Article VI of the Constitution of the United States, and has deprived them of a forum for adjudication of their right in violation of § 1 of the Fourteenth Amendment of that same Constitution. The questions presented are of major importance in the field of labor law.

II.

Proceedings Before the Agencies of the R. L. A. and in the Courts.

In 1938, respondent, Switchmen's Union of North America (hereafter called "defendant union") whose members still continue to man the job in question, attempted to nullify the trainmen's and conductors' May 26th, 1920 agreement, by invoking the jurisdiction of the National Mediation Board, on a claim that a representation dispute existed among all members of its union and the employees engaged in road service in the Buffalo District under the aforementioned agreement.

On October 27th, 1938, in Case No. R-291 (Pltfs. Ex. 5 in Ev., R. 251) the National Mediation Board found that:

> "Under date of July 31, 1935, the National Mediation Board issued a certification that the Switchmen's Union of North America had been duly designated and authorized to represent the yard conductors, yard brakemen and switchtenders in all the yards of the Delaware, Lackawanna and Western Railroad Company." (1st Sent., Find. 5, pg. 3, Pltfs. Ex. 5)
>
> "• • • The Switchmen's Union of North America was not authorized to represent them (plaintiffs) under the certificate of representation that was issued." (Last Sent., Find. 6, pg. 4, Pltfs. Ex. 5) (Italics Supplied.)

"On October 15, 1935, the carrier extended its agreement with the Switchmen's Union of North America, dated December 1, 1926, to include the employees in * * * Buffalo * * * formerly covered by the agreement with the Brotherhood of Railroad Trainmen." (3rd Sent., Find. 5, pg. 3, Pltfs. Ex. 5)

"But the transfer men in the Buffalo Terminal are not included under this agreement. They are still classified as roadmen and covered by the agreements with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen." (Last 2 Sents. Find. 5, pg. 3, Pltfs. Ex. 5)

As a result of those findings, that tribunal concluded:

"The Switchmen's Union of North America asks that an election be held in which this small number of transfer men (*45*) will be voted together with the approximately 900 other men whom it already represents. The outcome of such an election is obvious, and the purpose of the request for an election is clearly to secure a reclassification of the transfer men from road service to yard service." (Last two Sents., Conclusions, pg. 4, Pltfs. Ex. 5) (Italics supplied.)

"The transfer men in the Buffalo Terminal are classified as roadmen by valid agreements which have been in effect for 18 years. The National Mediation Board is without authority to change the specific classification of these agreements * * *." (1st Sent., 3rd pgh., Conclusions, pg. 5, Pltfs. Ex. 5)

"The Switchmen's Union merely desires to extend its representation to include the transfermen who are now classified as road conductors and road brakemen under the agreements between the Order of Railway Conductors, The Brotherhood of Railroad Trainmen, and the carrier." (Last Sent., 1st pgh., pg. 5, Conclusions, Pltfs. Ex. 5)

"If any reclassification is to be made it will have to be done by changing the existing agreements in accordance with the provisions for their amendment or interpretation." (Last Sent., 3rd pgh., Conclusions, pg. 5, Pltfs. Ex. 5)

"The National Mediation Board is not authorized to decide such a question under the guise of determining a representation dispute." (Last Sent., last pgh., pg. 5, Pltfs. Ex. 5)

"In view of these considerations the request of the Switchmen's Union for an election and a certification under Section 2, Ninth, of the Act must be denied, and it is so ordered." (1st pgh., pg. 6, Conclusions, Pltfs. Ex. 5)

Plaintiff union, in compliance with a request from defendant carrier, waited from March 25th, 1939, until August 23rd, 1944, for a promised determination of the dispute involved, which had been submitted by the conductors to the National Railroad Adjustment Board as of the former date (Pltfs. Ex. 7, R. 252; Pltfs. Ex. 19, R. 529). As of that latter date, the trainmen then invoked the jurisdiction of the National Railroad Adjustment Board, ~~for settlement of the dispute involved (§ 3 (m); § 153 (m), 45 U. S. C. A.).~~ In its submission to that Board, defendant carrier admitted that its October, 1935 contract with defendant union was "in direct conflict with the agreement with conductors and trainmen made in May, 1920." (Ex. 2a and 2b, R. 245, 253) ~~Ex. DD in Ev., R. 578).~~

On August 28th, 1945, the First Division of that Board decided:

"The question here involved should be adjusted by and between the interested organizations, *i. e.*, Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America, as it involves classification of service on run what seem to this Division to be conflicting agreements and facts concerning the dispute.

AWARD

Case dismissed."

Attempts on the part of plaintiff union to resolve the "question" in accordance with Adjustment Board's suggestion, proved futile (R. 302). Rather than violate the purpose of the Railway Act (§ 1; § 151 of 45 U. S. C. A.) by resorting to a strike, plaintiff union then brought action in the state court for a declaration as to its right of employment on the job in question (R. 532).

Thereafter, defendant railroad procured an order from the Court impleading defendant union (§ 193 of the C. P. A.) (R. 149). Following a trial wherein that Court, after holding it had jurisdiction, decided that plaintiff's contract was abrogated by an August 8th, 1935 letter (R. 99). As revealed later by the Court of Appeals' decision in this case, (303 N. Y. 411, p. 418) "Both of their *(Deft. Union and Pltf. Union)* agreements with defendant railroad are concededly legal and valid." Both also "covered identical jobs" (Italics supplied) (R. 670).

On appeal, by plaintiff union, the Appellate Division reversed on the law and dismissed on the law, the complaint on authority of this Court's decision in Slocum v. D. L. & W. R. R. Co., 339 U. S. 239 (R. 651).

Appeal therefrom was taken by plaintiff union to the Court of Appeals (R. 642). That Court on January 24th, 1952, unanimously affirmed the Appellate Division with opinion (303 N. Y. 411; R. 657, 680). Thereafter, a motion to amend that Court's remittitur to show that federal constitutional questions were presented and necessarily passed on by that Court, was granted on March 13, 1952 (R. 679). Both the remittitur and amended remittitur were filed in trial court's County Clerk's Office. An order to make the judgment of the Court of Appeals that of the Supreme Court of the State of New York, and a judgment based thereon, were filed in the Erie County Clerk's Office on March 31st, 1952 (R. 685, 689). A short historical background of the making and the applicable portion of petitioners' May 26th, 1920 contract, (Find. 3 of Pltfs. Ex. 5; R. 251) which, in 1926 was adopted as an Appendix to petitioners' Ex. 4 in Ev. (R. 250) and applicable portions of Respondent-union's October 15th, 1935 contract, (Ex. DD in Ev.; R. 578) together with §§ 473 and 193 of the New York State C. P. A., and applicable portions of statutes of the Railway Labor Act, have been hereinafter set forth in an Appendix to brief.

III.

The Questions Presented.

(1) Whether Congress, by § 3 (i) of the Railway Labor Act conferred on the National Railroad Adjustment Board, the therein defined limited jurisdiction or the unlimited jurisdiction created by deleting therefrom the following restrictive words of the section of the Act: "* * * disputes * * * growing * * * out of the interpretation or application of agreements * * *"?

(2) Whether that legislative body, by § 3 (m) of that same Act intended to subject the Adjustment Board's dismissal of a case without award to review by the courts and a revival of the issue for a mandated determination on resubmission to that same Board?

(3) Whether the state court, relying on this Court's decisions in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, and Order of Conductors v. Pitney, 326 U. S. 561, as authority for its dismissal of the complaint, misinterpreted the therein restricted application and construction of § 3 of the Railway Labor Act?

(4) Whether the state court, to sustain its dismissal of the complaint, erroneously relied on a finding of the Adjustment Board and conclusion of the National Mediation Board, in connection with their prior decisions in this case?

(5) Whether the state court misinterpreted and misapplied the federal court decisions relied on for such dismissal?

(6) Whether the state court, as indicated in its opinion, undertook to confer upon the Adjustment Board, jurisdiction to determine a jurisdictional dispute between unions?

(7) Was the state court's construction of the Railway Labor Act and its interpretation of this Court's decisions such as to violate the union's rights under Article VI of the Constitution of the United States?

(8) Did such dismissal of the complaint by the state court deprive the union of a forum in which to adjudicate its claimed contractual right, as guaranteed by the "due process" clause of Amendment XIV, § I of the Constitution of the United States?

IV.

Jurisdiction.

The jurisdiction of this Court is based upon Title 28, U. S. C. A., Sec. 1257-(3). The remittitur of the Court of Appeals was entered on the 24th day of January, 1952, and the amended remittitur thereof, showing that questions under the federal constitution had been presented and were necessarily passed upon, was thereafter entered on the 13th day of March, 1952. An order and judgment of the Supreme Court of the State of New York, making the judgment of the Court of Appeals the final judgment in the case, was filed and entered in the Office of the Clerk of Erie County, on the 31st day of March, 1952.

V.

The Reasons Relied Upon for the Allowance of the Writ.

1. Each of the eight questions presented create a separate issue which has not been heretofore squarely passed upon by this Court. In making that statement, however, petitioners appreciate that the issues created by questions "(7)" and "(8)" depend on the separate and combined

issues presented by the first six questions. The importance of these questions in the administration of the Railway Labor Act, and in the day-to-day working relations between carriers and labor organizations can hardly be overemphasized. The public considerations involved are stressed in the purpose of the Railway Labor Act.

2. A decision of this Court is imperative for the purpose of stabilizing industrial relations in the field of railway labor. The decision of the state court in this case, now tends to revivify every case heretofore dismissed by the various Adjustment Boards, and also endanger each and every existent carrier-union agreement in the United States, by failing to afford a remedy for an abuse of clear breaches of solemn, clear and unambiguous contracts. As a consequence of that decision, a carrier, by simply making an agreement in direct conflict with an existent one can escape the liability imposed by the prior existent contract.

Furthermore, that state court decision goes so far as to completely nullify the Railway Labor Act and destroy the rights that existed prior to the enactment thereof. It charges the situation, thus created by its decision, to failure of Congress to mandate a decision by the National Railroad Adjustment Board on re-submission to that agency and/or failure to provide a review of the Adjustment Board's "dismissal" of a dispute and/or compel a determination on the "merits" of a controversy presented thereto. In view of the claimed violation of the national policy, the case also presents important and far-reaching questions of the relation between the federal and state judiciary in the field of federal cognizance.

(3) Inasmuch as petitioners exhausted the administrative procedure of the Railway Labor Act before seeking relief in the courts, the decision in the present case is in

conflict with this Court's decisions in Slocum v. Delaware, L. & W. R. Co. (339 U. S. 239) and Order of Railway Conductors v. Pitney (326 U. S. 561). In those cases, this Court held that § 3 of the Railway Labor Act requires the courts to refuse jurisdiction of this type of controversy, prior to submission thereof to the Railroad Adjustment Board.

Because of the claimed conflict between this case and the Slocum Case, *Supra*, it is respectfully submitted that the subject is one which urgently requires clarification by this Tribunal. It is the contention of the petitioner that the law enunciated in the Slocum Case, *Supra*, was to apply only to that particular type of controversy which this Court therein so described and so limited as a procedural step that must be resorted to and exhausted in accordance with the jurisdictional limitations of §§ 2 and 3 of the Railway Labor Act.

4. From what has been heretofore pointed out, it is obvious that the dismissal of the complaint by the state court constituted a violation of plaintiffs' rights under the "due process" clause of Amendment Fourteen, Section I of the Constitution of the United States. That is so because plaintiff union is now deprived of a forum for adjudication of its rights and is left a right without a remedy.

5. The decision of the Court of Appeals conflicts with the decisions of this Court in Bethlehem Steel Co. v. N. Y. State Labor Relations Board, 330 U. S. 767, and LaCrosse Telephone Co. v. Wisconsin Employ. Rel. Bd., 336 U. S. 18.

Therein this Court held that where the Federal Authority has occupied the field, the right of the state to legislate in the same field is suspended. It is submitted by the petitioner that the same principle applies to action by state courts in a field occupied by tribunals created by federal enactment.

The respondent carrier is concededly engaged in interstate commerce. The industry is one over which the Railway Labor Act and the several Boards created thereunder has consistently exercised jurisdiction.

6. In view of the situation presented, the congressional policy to dispose of a type of disputes by specially qualified administrative tribunals may thus be set at naught by either party to a carrier-union agreement. It may be confidently predicted that one state court decision will be contradicted by that of another. In that event the very wrongs, which the framers of the Act intended to eliminate, would be continued and a consistent application of the rules and working conditions of carrier-union agreements would become impossible.

This case also presents a situation analogous to that which prevailed in a broader area of jurisprudence prior to the decision of this Court in Erie Railroad Co. v. Tompkins, 304 U. S. 64. It is submitted, therefore, that these practical considerations with respect to the operation of the Railway Labor Act imperatively require a review of the decision below by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York in this action.

THOMAS J. McKENNA,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

POINT I.

To sustain its affirmance of dismissal of the complaint, the Court of Appeals of the State of New York erroneously relied on: (1) its construction of § 3 (i) of the Railway Labor Act; (2) a failure to recognize and apply § 3 (m) of that same Act; (3) misinterpretation of two prior decisions of this Court; (4) a prior finding by the Adjustment Board in this case, and a conclusion by the National Mediation Board; (5) a misinterpretation of application of federal decisions; (6) an indicated inter-union dispute.

(1) Its construction of § 3 (i) of the Railway Labor Act.

After quoting § 3, subd. (i), U. S. Code, tit. 45, § 153, subd. (i), at pages 669 and 670 of the record, and after alluding to the words "interpretation" and "application" thereof on page 670 of the record, the Court of Appeals, thereafter, at pages 670 and 671 of the record said:

> "And, beyond that, we fail to see how, in any event, it may be said that the dispute is not one 'growing out of grievances * * * concerning rates of pay, rules, or working conditions' (id.)."

Congress never intended to confer on the Adjustment Board the unlimited jurisdiction relied on by the Court of Appeals as a result of its deleting the restrictive words of the statute.

It restricted that Board's jurisdiction to "the disputes between an employee or group of employees, and carrier or carriers, "growing * * * out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Such has been heretofore pointed out by this Court. (Slocum v. D. L. & W., 339 U. S. 239; O. R. C. v. Pitney, *et al.*, 326 U. S. 561; Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 723, 726)

In the Slocum Case, *supra,* at page 243, this Court said:

> "The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies FOR ADJUSTMENT OF RAILROAD-EMPLOYEE DISPUTES GROWING OUT OF THE INTERPRETATION OF EXISTING AGREEMENTS." (Emphasis supplied)

In the Pitney Case, *supra,* this Court said, at page 565:

> "But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute."

In the Elgin Case, *supra,* this Court said, at page 723:

> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

That such jurisdiction of the Adjustment Board was not extended to that of making new contracts or altering or amending existing ones is to be adduced from this Court's ruling that the Railway Labor Act did not grant such jurisdiction. This was pointed out in the case of Terminal R. R. Assn. of St. Louis v. Brotherhood of Railroad Trainmen and one, 318 U. S. 1, wherein this Court, at page 6 said:

> "The Railway Labor Act, unlike the National Labor Relations Act, does not undertake governmental regulations of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain

> for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

The Circuit Court of Appeals of the Ninth Circuit, in the case of Southern Pac. Co. v. Joint Council Dining Car Employes (165 F. 2d 26) writ of certiorari denied 333 U. S. 838, held the Railroad Adjustment Board's jurisdiction is limited to disputes involving interpretation and application of contracts between carriers and their employees. Railway Labor Act, § 3 and subd. 1 (i), 45 U. S. C. A. § 153 and subd. 1 (i).

In connection with that decision, that Court quoted on page 28, the Adjustment Board's own admitted recognition as the limits of its jurisdiction by reciting:

> "From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties."

Order of R. R. Tel. v. New Orleans, Texas & Mex. Ry. Co., 156 F. 2d 1, certiorari denied, 329 U. S. 728, rehearing denied, 329 U. S. 829, at page 5 of the Fed. 2d citation, that Court in holding that the National Railroad Adjustment Board was only jurisdictionally empowered to settle disputes arising out of the interpretation and application of carrier-union contracts and has no legal authority to pass on disputes between the crafts, said:

> "The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts; but it is given no authority to pass on disputes between the crafts."

In Hunter v. Atcheson, Topeka & Sante Fe R. Co., 171 F. 2d 594, certiorari denied, 337 U. S. 916, the Court, at page 598, first pointed out:

> "That the contract between the brakeman and the carrier which the Board purported to interpret and apply is free from ambiguity can hardly be doubted."

Thereafter, that Court, at page 599, declared an award of the National Railroad Adjustment Board void by saying:

> "In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier. We think the five members of the Board who dissented from the Award properly characterized the action of the majority when they stated in their dissenting opinion: 'The lesson of the award is that contracts may be altered, changed, or amended in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement. That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us.'"

See also

Shipley v. Pittsburgh and L. E. R. Co., D. C. Pa. 1949, 83 F. Supp. 722.

On July 24, 1950, subsequent to the decision of the Slocum Case, *supra,* the United States Circuit Court of Appeals, on the second appeal to that Court in M. K. T. R. & Co., *et al.* v. Randolph, *et al.,* 182 F. 2d 996, affirming 85 F. Supp. 846, held that court had the right to grant relief where plaintiffs' efforts for relief conformable to the direction of the Court of Appeals as so directed in the first appeal of this case were unavailing and the proper authorities under the Railway Labor Act dismissed the proceeding.

The District Court, in 85 F. Supp. 846, at page 847, in dealing with the jurisdiction of the Railway Labor Act, held:

> "It did not confer jurisdiction upon the Adjustment or Mediation Boards to pass upon clear breaches of solemn clear contracts * * *"

The Circuit Court of Appeals in that case in support of its ruling at page 998, re-quoted the following from page 847 of the District Court's opinion:

> "Unless this Court now takes jurisdiction of the subject matter, the ancient and revered maxim '*Ubi jus, ibi remedium* (Where there is a right, there is a remedy)' would become meaningless. Unquestionably somewhere these plaintiffs should find a court or a tribunal where the sacred rights of a clear contract could be preserved and maintained for them. Moreover, they should not be buffeted from pillar to post in a vain search for a tribunal that can vouchsafe to them their rights."

By the inclusion of "grievances" in § 3 (i), Congress intended to confer on the Adjustment Board, jurisdictional power to determine claims by an employee or employees arising out of arbitrary or capricious conduct on the part of foremen or supervisors in dismissing or otherwise punishing employees. Such has been heretofore pointed out by the following decisions:

Railway Yard Masters of N. A. vs. Indiana Harbor Belt R. Co., 70 F. Supp. 914; 166 F. 2d 326.

Odom vs. Thompson, 85 F. Supp. 477.

Ramsey vs. Chesapeake & O. R. Co., 75 F. Supp. 740.

Kelly vs. Nashville & St. L. Ry., 75 F. Supp. 737.

Hecox vs. Pullman Co., 85 F. Supp. 34.

Berryman vs. Pullman Co., 48 F. Supp. 542.

Patterson vs. Chicago & Eastern Ill. R. Co., 50 F. Supp. 334.

(2) A failure to recognize and apply § 3 (m) of that same Act.

By § 3 (m) of the Railway Labor Act, the Adjustment Board is not precluded from dismissing claims arising from carrier-union agreements after it finds that the dispute is not one that can be settled through interpretation or application of the agreements.

A complete examination of Exhibits 2a and 2b in Ev. (R. 253, 254) reveals that defendant railroad failed to point to any word, phrase, clause or sentence in petitioners' or respondent union's contracts which was susceptible to interpretation or application for the purpose of settlement of this dispute by that Board.

In this case, there was no money award, and for that reason, the decision of the Adjustment Board was final and binding upon petitioners and respondents, as prescribed by § 3 (m). That subdivision (m) provides as follows:

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the awards in the light of the dispute."

From a reading of that section, it is obvious that Congress intended that the decisions of the Adjustment Board which did not involve awards, were to be one of finality and not subject to review by the courts. Decisions sustaining that contention are:

> Futhey vs. Atchison T. S. F. Ry. Co., 96 F. Supp. 864.
>
> Burke vs. Union Pac. R. Co., C. C. A. Utah 129 F. 2d 844.

Reynolds vs. Denver & Rio Grande Western Ry. Co., 174 F. 2d 673.

Railway Yard Master of N. A. vs. Pittsburgh & L. E. R. Co., 39 F. Supp. 876.

Berryman vs. Pullman Co., 48 F. Supp. 542.

Hecox vs. Pullman Co., 85 F. Supp. 34.

(3) Misinterpretation of two prior decisions of this Court.

That the state court erred in relying on this Court's opinions in the Slocum case, *supra,* and the Pitney case, *supra,* as authorities for dismissal of the complaint, is obvious from a reading of said cases (R. 669, 671, 672, 675, 676).

This Court, in the Slocum case, *supra,* and the Pitney case, *supra,* restricted its decisions to the therein expressed holding that the Adjustment Board must be given first opportunity to determine disputes arising out of the interpretation and application of carrier-union agreement. Those cases did not decide that the Adjustment Board could not dismiss a case if it found that the contracts were clear and unambiguous and not susceptible to interpretation for adjustment of the dispute, nor did either of the two decisions confer upon that Board jurisdiction to make new contracts or alter or amend existing agreements as heretofore pointed out under "I" of this brief.

At page 240 of the Slocum case, *supra,* this Court presented the question as follows:

> "The question presented is whether state courts have power to adjudicate disputes involving such interpretation WHEN THE ADJUSTMENT BOARD HAS NOT ACTED." (Emphasis supplied)

And then at page 242, it pointed out the dispute concerned as follows:

> "In this case the dispute concerned interpretation of an existing bargaining agreement."

and thereafter, at page 244 it set forth the limited decision as follows:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes OF THE TYPE HERE INVOLVED IS EXCLUSIVE." (Emphasis supplied)

In Order of Railway Conductors of America, *et al.* v. Pitney, *et al.* Trustees of Central Railroad Co. of New Jersey, *et al.*, 326 U. S. 561, at page 567 said:

> "Under these circumstances *the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue.*"

(4) A prior finding by the Adjustment Board in this case, and a conclusion by the National Mediation Board.

In its effort to further its contention that the Adjustment Board should not have dismissed this case, the Court of Appeals (R. 669) sought to capitalize on the following finding from the Adjustment Board's decision: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein." What was meant by that finding was that it was one of the four jurisdictions which had authority to hear the case as provided by §§ 3 (h) and 3 (i). Inasmuch as this situation also requires interpretation, it is the first issue to be decided by a division of the Adjustment Board to which the case had been submitted. In connection with that situation, this Court has heretofore made a decision. (O. R. C. of America v. Swan, 329 U. S. 520.)

Furthermore, in this connection, attention of this Court is directed to what appears on the exhibit (R. 676) which was offered to the Court of Appeals at the time of argument by respondent railroad (Award No. 14673). By looking to page 15 of that Award it will be noted that the First Division therein recited:

> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein".

That this finding by the Adjustment Board did not confer jurisdiction on the Board to make a determination, appears as follows on page 15 thereof:

> "There has been no final determination by the interested organizations of this jurisdictional issue; that is, whether or not the road crews concerned may properly perform work within switching limits."

In connection therewith, it then went on to further recite:

> "The Railway Labor Act does not confer upon this Board power to adjudicate questions of jurisdiction herein present."

It then, unlike the Adjustment Board in the present case, dismissed by saying:

> "Therefore, these claims are hereby dismissed without prejudice to their being reinstituted after all interested organizations have agreed or settled the issue as to who should perform the work in question."

In the above entitled dispute, the National Railroad Adjustment Board found itself without power to adjudicate the jurisdictional question presented and dismissed the claim until said question was determined by the proper forum. In that dispute the jurisdictional issue would necessarily have to be resolved by the National Mediation Board.

In petitioners' case, the National Railroad Adjustment Board dismissed the claim only after the National Mediation Board had previously held that it had no power to settle the dispute since there was no jurisdictional question involved but rather, two valid but conflicting contracts existed.

Thus the 1945 decision of the National Railroad Adjustment Board that it had no authority to act on plaintiffs' claim, left the petitioners' without any possible relief un-

der the Railway Labor Act in view of the National Mediation Board's previous determination that the dispute was also beyond their powers to adjudicate.

At pg. 671 of the Record, the Court of Appeals therein stated:

> "And, significantly, the National Mediation Board, in connection with defendant union's claim in 1938 in this very case, after declaring that it was without authority 'to change the specific classification of these [union] agreements', went on to say, 'If any reclassification is to be made it will have to be done by changing the existing agreements in accordance with the provisions for their amendment or interpretation.' 'Interpretation', of course, requires presentation to the Adjustment Board."

By looking to the above quoted, it will be noted that the National Mediation Board also provided for an amendment of the contract to meet the situation presented. Furthermore, that Board was not jurisdictionally empowered to confer upon the Adjustment Board any greater jurisdiction than that provided by statute. It will be noted that both the Adjustment Board and National Mediation Board, as part of their decision, followed the policy of the purpose of the Railway Labor Act, (§ 151 (a) 45 U. S. C. A.) as heretofore enunciated by this Court in General Committee, etc, v. M.- K.- T.- R Co., 320 U. S. 323, wherein this Court at page 337 said:

> "All else it left to those voluntary processes whose use Congress had long encouraged to protect those arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability."

(5) A misinterpretation of application of federal decisions.

That the Court of Appeals misinterpreted and misapplied the cases relied ~~on~~ upon on page 674 of the Record is obvious from a study of those cases. The case of New

Orleans Public Belt Railroad Comn. v. Ward, 182 F. 2d 654, 656 was one in which the carrier sought a declaratory judgment, after an award had been made to an employee by the Adjustment Board. Overlooked was the fact that sub-section (p) of § 3 of the Railway Labor Act limited a right of action in Court to the employee receiving the award. That Subsection (p) insofar as applicable to this case provides:

> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States * * *."

In connection with that case, however, this Court's attention is called to a later decision in that case, Ward v. N. Orleans Public Belt Line, decided in 1951 in 97 F. Supp. 1002. In that later case, petitioner brought action in the federal court and recovered on the award.

By looking to Hayes v. Union Pacific (184 F. 2d 337, 338) it will be noted that no resort had been made to the Adjustment Board prior to invoking jurisdiction of the federal court and inasmuch as the action was one for breach of contract and no diversity of citizenship was shown that case held that the federal court did not have jurisdiction of the action. Had that action for breach of contract, after the Adjustment Board had dismissed without an award, been brought in the state court as in this case, a different situation would have been presented.

By looking to the Hettenbaugh v. Airline Pilots Assn. International, *supra* (189 F. 2d 319, 321) the rule in that case in no way applied to the present case. In that case, at page 321, the federal court dismissed for two reasons.

In dismissing for want of jurisdiction (Pg. 321) the Court, at page 320, held:

> "We are of the opinion that the complaint does not have a sufficient showing of diversity of citizenship or of a federal question to warrant a federal court in taking jurisdiction. No diversity of citizenship is alleged."

At page 321 it further held:

> "The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements."

Plaintiffs do not contend that the Railway Labor Act granted jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements.

In an effort to further its point, the Court of Appeals relied on the dictum of that case (R. 675).

(6) An indicated inter-union dispute.

The Court of Appeals indicated on pg. 666 of the record that this case was one involving a jurisdictional dispute between unions. This it did by reciting as follows:

> "This suit concerns a controversy between rival railroad unions—in which defendant railroad is necessarily involved—as to which union is entitled to furnish employee-members to man certain railroad operations or 'runs', known collectively as the '3:00 P. M. City Line Job' * * *".

That the National Mediation Board has exclusive jurisdiction over inter-union disputes has been heretofore decided by this Court in Switchmen's Union v. N. M. B., *et al.*, 320 U. S. 297 and Case of Gen. Comm. v. M.-K.-T. R. Co., 320 U. S. 323. This Court therein held that that Board's (National Mediation) decision is one of finality and not subject to review by the courts.

Furthermore, in this connection, it will be noted that the parties to this action were before the National Mediation Board in 1938, and that Board decided that no jurisdictional dispute existed between the rival unions (Petitioners' Ex. 5 in Ev., R. 250).

To sustain its decision, that the Adjustment Board had exclusive jurisdiction and must settle the dispute, the Court of Appeals (R. 676) maintained that if the decision was one of finality, it then violated its defined purpose.

POINT II.

The Appellate Division's and Court of Appeals' decisions violated plaintiffs' rights under Article VI of the Constitution of the United States. (R. 679)

From everything that has been heretofore pointed out in this brief, decisions of the Appellate Division and Court of Appeals would also serve as a means of circumventing and destroying plaintiffs' rights under Article VI of the Constitution of the United States. That article, insofar as applicable to this case recites:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Thus, where state action conflicts with national policy, and the national policy, such as here, has been formulated by Congress and declared by the Supreme Court, the supremacy clause, United States Const., Art. VI, and ordinary comity prevent the state courts from following a different one, of their own making. People of State of

California v. Zook, 336 U. S. 725, 69 S. Ct. 841, 843; Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 181, 7 N. E. 2d 30, 31, 110 A. L. R. 1411.

Decisions of United States Supreme Court controlling in cases involving rights under a federal statute were controlling in cases involving questions arising under this chapter. Edelstein v. Duluth, M. & I. R. Ry. Co., Minn. 1948, 31 N. W. 2d 465.

A decision of the United States Supreme Court construing the rights of employees under this chapter would be followed for sake of uniformity in construing contract between railroad employees and unions where contract closely conformed to provisions of this chapter. Texas & New Orleans R. Co. v. McCombs, Tex. 1944, 183 S. W. 2d 716.

The New York Court of Appeals has also recognized this supremacy of jurisdiction as it exists under the Railway Labor Act ~~when~~ in the case of Long Island R. R. Co. vs. Dept. of Labor, 256 N. Y. 498, 516, 517.

POINT III.

Plaintiffs' rights under the "Due Process" clause of Amendment 14, Section I, of the Constitution of the United States were violated. (R. 679)

Insofar as it is applicable to the case, Amendment 14, Sec. I, of the Constitution of the United States provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By virtue of the Court of Appeals' and Appellate Division's decision in this case, Petitioners, having exhausted

the available remedies of the Railway Labor Act for preservation and maintenance of their rights under their valid and existent contract, are now deprived of a tribunal that can vouchsafe to them their rights.

Such constitutes a violation of plaintiffs' rights under the due process clause of the state and federal constitutions. The right possessed by a person of enforcing his claim against another is property. (Gilbert v. Ackerman, 1899, 159 N. Y. 118, 53 N. E. 753.)

As heretofore pointed out in M-K-T-R Co. case, *supra*, under Point I of this brief, the Circuit Court of Appeals when confronted with such a situation as confronts this Court in this case, held that the Courts should grant relief after an agency of the R. L. A. ~~had declared that it was not jurisdictionally empowered to settle the dispute and said agency~~ had dismissed the proceeding.

Busch Jewelry Co., Inc. v. United Retail etc., Union, 168 Misc. 224, at page 232 said:

> "* * * Constitutionally, equity jurisdiction is an inherent element of the state court. If a litigant is entitled to an equitable remedy and has no adequate legal remedy a destruction of such right of redress would be a denial of justice, and thus a violation of both State and Federal Constitutions. In fact, in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, the Supreme Court of the United States so held."

The guarantees of due process of law require that the substance of property rights be preserved. (Bradley v. Lightcap, 195 U. S. 24, 25, 49 L. Ed. 75; Bradley v. Lightcap, 195 U. S. 1, 49 L. Ed. 65; Southern Railway Company v. Carson, 134 U. S. 136, 48 L. Ed. 907.

Such guarantees also require some adequate and appropriate remedy be afforded for their vindication. (River-

side, etc. Cotton Mills v. Menefee, 237 U. S. 189; Campbell v. Holt, 115 U. S. 620; Hurtado v. California, 110 U. S. 516.

In addition thereto, they require also that such remedies be a regular and orderly mode of procedure. (Davidson v. New Orleans, 96 U. S. 97.

CONCLUSION.

The petition for Certiorari should be granted in order that this Court may review the judgment of the Court of Appeals, State of New York, in this case.

Respectfully submitted,

THOMAS J. McKENNA,
Attorney for Petitioners.

APPENDIX.

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U. S. C. A., Sec. 151, *et seq.)* are as follows:

"Sec. 1. § 151. DEFINITIONS: RAILWAY LABOR ACT. Second: The term 'Adjustment Board' means the National Railroad Adjustment Board created by this chapter.

Third: The term 'Mediation Board' means the National Mediation Board created by this chapter."

"Sec. 1a: § 151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, as added June 21, 1934, c. 691, § 2, 48 Stat. 1186."

"Sec. 2. § 152. GENERAL DUTIES—DUTY OF CARRIERS AND EMPLOYEES TO SETTLE DISPUTES.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.

SEVENTH. No carrier, its officers, or agents shall **change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.**

Disputes as to identity of representatives; designation by Mediation Board; secret elections.

NINTH. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

"§ 153. NATIONAL RAILROAD ADJUSTMENT BOARD—ESTABLISHMENT; COMPOSITION; POWERS AND DUTIES; DIVISIONS; HEARINGS AND AWARDS.

First. There is hereby established a Board to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided:

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train-and-yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the awards in the light of the dispute.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises."

"§ 156. PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 153 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

"§ 157. ARBITRATION—SUBMISSION OF CONTROVERSY TO ARBITRATION.

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be sub-

mitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: PROVIDED, HOWEVER, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

The present action is one for declaratory judgment under § 473 of the Civil Practice Act and Rules 210, 211 and 212 of the Civil Practice Act.

"§ 473 of the Civil Practice Act provides:

Declaratory judgments. The Supreme Court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

§ 193 of the same Act, providing for impleading interested parties, recites:

"§ 193. Indispensable and conditionally necessary parties. 1. A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispensable party. A person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party.

2. When it appears that an indispensable party has not been joined, the court shall order such party brought in. If a party fails or neglects to bring in an indispensable party after a reasonable period granted to him to do so, the court shall dismiss the action without prejudice. When it appears that a conditionally necessary party has not been joined, the court shall

order such party to be brought in if he is subject to the jurisdiction of the court and can be brought in without undue delay. The court in its discretion may proceed in the action without a conditionally necessary party if his addition would cause undue delay or if the jurisdiction can be acquired over him only by his consent or voluntary appearance. If a party fails or neglects to bring in a conditionally necessary party, after a reasonable period granted to him do so, the court may in its discretion dismiss the action without prejudice.

3. The provisions of this section shall be applicable to all actions whether formerly denominated legal or equitable."

History of making and applicable portion of petitioners' May 26th, 1920 contract (Find. 3, 3rd and 4th page of Pltfs. Ex. 5 in Ev., R. 251). That contract was subsequently adopted as an Appendix to the 1926 Main-Line-Road-Contract of conductors and trainmen, page 33, which also became identified as Plaintiffs' Ex. 4 in Ev. (R. 250). Such appears as follows in Finding 3:

"3. Subsequent to this releasing of the contract with respect to the Buffalo yard the carrier entered into negotiations with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen for the purpose of turning over the work that had been done by the switchmen who left the service to the road employees of the carrier who were represented by these two organizations. On May 26, 1920, the carrier entered into an agreement with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen which was signed jointly by the general chairmen of the two organizations, the pertinent provisions of which were as follows:

'The following rules will govern the handling of specified runs in the Buffalo District.

'(a) The following runs will be included in Road Service:

'1. Regularly assigned transfer runs between East Buffalo, Black Rock, Abbot Road Yard, Nickel Plate Junction and Erie Street.

'2. Local and industrial work between Black Rock and East Buffalo.

'3. Local and industrial work at Depew and Lancaster.

'4. Work trains starting from East Buffalo and operating between that point and Black Rock or Erie Street.

'(b) Seniority rights of Buffalo Division conductors and trainmen, will, in addition to main line road service, include service enumerated under (a).

'(c) Road rates for conductors will apply, according to classification indicate, viz., runs 1, 2, 3, and 4, roustbout rates. Yard rates will apply to trainmen.

'(d) Crews in transfer service may be required to perform such switching service as has heretofore been done by yardmen in such transfer service.' ''

The applicable portion of state court's impleaded-respondent-union's contract of October 15, 1935, which includes Buffalo (Ex. DD in Ev., R. 578). The inside of cover thereof recites:

''MEMORANDUM

Under date of July 31st, 1935, the National Mediation Board issued a Certification that the Switchmen's Union of North America has been duly designated and authorized to represent the Yard Conductors, Yard Brakemen and Switchtenders of the Delaware, Lackawanna & Western Railroad Company.

For the purpose of carrying out the intent of this Certification it is hereby agreed that in future negotiations covering wages and working conditions and representation of Yard Conductors, Yard Brakemen and Switchtenders the contract effective Dec. 1st, 1926 between the Switchmen's Union of North America and

the Delaware, Lackawanna and Western Railroad Company will be extended to covering the following territory. * * * Buffalo, * * *."

On page 6 of that Exhibit, under Section 9 thereof, appears the portion of the Switchmen's contract which defendant railroad admits is "in direct conflict" with the applicable portion of petitioners' contract: (p. 4, Pltfs. Exs. 2a & 2b, R. 253, 254)

"LIMITS OF YARD TERRITORY

9. All territory under the jurisdiction of one yard master, general yard master or terminal trainmaster, will be considered one yard. All work in that territory will be performed by switchmen."

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